

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

STEPHEN A. KELLOGG,	)	Case No. 05-0955-MJP-JPD
	)	
Petitioner,	)	
	)	ORDER DIRECTING
v.	)	SUPPLEMENTATION OF
	)	THE RECORD
DR. ANDREW PHILLIPS,	)	
	)	
Respondent.	)	

---

This matter comes before the Court upon the petitioner's filing for a writ of habeas corpus under 28 U.S.C. § 2254. On July 23, 1990, petitioner was found not guilty by reason of insanity after being charged with first degree murder in Snohomish County Superior Court. Dkt. No. 12, Exs. 1, 2. Following a determination that petitioner was competent to enter a plea, the Superior Court committed him to Western State Hospital ( "WSH") for psychiatric treatment, where he remains incarcerated. *Id.* at Ex. 1.

On May 24, 2005, petitioner filed a 28 U.S.C. § 2254 petition for writ of habeas corpus in this Court, raising three claims for relief. Dkt. Nos. 1, 4. In its answer, respondent argues that the petition is time-barred and that it is not subject to equitable tolling. Dkt. No. 10. Having carefully reviewed the parties' papers and the available record, the Court ORDERS as follows:

(1) Respondent is ORDERED to supplement the record with information regarding whether petitioner was mentally or legally competent to file a habeas petition during the period of April 24, 1996, to April 24, 1997. R. Gov. § 2254 Cases In U.S. Dist. Cts. 7. Respondent


01 shall submit such information no later than **November 18, 2005**. Petitioner's petition for writ  
02 of habeas corpus shall be re-noted for that date.

03 Mental incompetence can satisfy the high standard necessary to permit equitable tolling.  
04 *Calderon v. U.S. Dist. Court for Cent. Dist. of California (Kelly)*, 163 F.3d 530, 541-42 (9th  
05 Cir. 1998) (en banc), *abrogated in part on other grounds by Woodford v. Garceau*, 538 U.S.  
06 202, 209-10 (2003). In order to do so, petitioner must show that his "mental incompetence in  
07 fact caused him to fail to meet the . . . filing deadline[.]" *Laws v. Lamarque*, 351 F.3d 919,  
08 923 (9th Cir. 2003). This inquiry must focus on the period in which the equitable tolling  
09 would have applied. *Id.* at 923-24. When a petitioner asserts in a verified petition that he is  
10 entitled to equitable tolling based on mental incompetence and the record lacks evidence to the  
11 contrary, the Court must order further factual development. *Id.* at 924.

12 In this case, the period in which equitable tolling would apply is April 24, 1996, to  
13 April 24, 1997. *See Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001) (indicating that  
14 the deadline for federal habeas petitioners convicted before April 24, 1996, to file timely was  
15 April 24, 1997). Although petitioner was found competent to enter his plea, his reply states  
16 that "[m]ental illness has prevented [him] from timely filing" his petition. Dkt. No. 14.  
17 Petitioner has also submitted treatment notes from 2004 and 2005 which indicate that he  
18 suffers from a schizoaffective disorder, has delusional thought processes, and he is a danger to  
19 others. *Id.* This evidence does not conclusively indicate whether petitioner was competent  
20 during the period in question, but it does suggest that this may be the case. Without more  
21 evidence relevant to the period in question, "we do not know whether [petitioner's] mental  
22 condition had deteriorated since [trial] such that he fell below a minimum standard of legal  
23 competence." *Laws*, 351 F.3d at 923. Hence, the current record in this case is inadequate to  
24 determine whether petitioner was mentally incompetent to file his habeas petition during the  
25 period in question and the record must be supplemented.

01 (2) The Clerk is directed to send a copy of this Order to petitioner, counsel for  
02 respondent and to the Honorable Marsha J. Pechman.

03 DATED this 14th day of October, 2005.

04   
05 JAMES P. DONOHUE  
06 United States Magistrate Judge  
07  
08  
09  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26